APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1943.

No. 3960.

MARIO MERCADO RIERA, EXECUTOR, ET AL., *Appellants*,

v.

MARIA MERCADO RIERA DE BELAVAL, ET AL., *Appellees*.

Consolidated Appeals from the Supreme Court of Puerto Rico.

Judgments, July 14, 1943.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

Prayer and Motion.

The appellants, Mario Mercado Riera, Executor, and Pedro M. Porrata, Partitioner, by their undersigned attorneys, hereby respectfully petition for a rehearing of this case and reconsideration of the opinion and judgment entered herein on November 23, 1945, upon the grounds below indicated, and also move that, in event of denial of this petition, issuance of the mandate herein be stayed to enable the appellants, within the time allowed by law, to submit to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court in this case.

Grounds for Petition.

In General.

Referring to the advance pamphlet edition of the opinion of this court, initially to that part on pages 14 and 15, dealing with the first of the federal questions involved, appellants believe the court has not grasped the precise nature or full scope of the question sought to be presented, and has thus fallen into the error of dismissing it without due consideration of important factors that should influence the decision.

It is not merely the form of procedure of the insular courts that appellants contend was in effect crystallized, subject only to statutory amendment, by Section 40 of the Organic Act of March 2, 1917. It is also the more important "judicial power" or jurisdiction of those courts, as prescribed by the laws then in force in Puerto Rico and prior judicial interpretations of those laws, which appellants believe was so crystallized or fixed. In other words, appellants' argument is not merely that the Supreme Court of Puerto Rico violated the Organic Act in matters of procedure by granting certiorari here, but also that that court was wholly without jurisdiction to grant certiorari here by reason of the limitations imposed by that Act.

This court declares in substance that it does not construe the Organic Act as crystallizing insular procedure. Characterizing the pertinent language of that Act as brief and general, this court states that it cannot draw therefrom the inference that Congress intended strictly to limit the Supreme Court of Puerto Rico only to such procedure as was in vogue on the date of the Organic Act; and that, instead, this court thinks that Congress in Section 40 of that Act intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the Common Law, could develop as they see fit.

As to whether this court entertains similar views regarding the effect of the limitations imposed by Section 40 on jurisdiction, the opinion is silent. However, since the terms of the statute relating to judicial powers are precisely the same as those relating to procedure, it seems properly inferable that the court does regard the statute as equally elastic in that direction.

In any event, except for its bare reference to the brief and general language of Section 40, the opinion reveals no statement of the reasons for its above-indicated conclusions.

True the language of Section 40 is brief, and perhaps in a sense general, but it is none the less plain and mandatory in its provision that: "*The jurisdiction of said courts and the form of procedure in them, . . . shall also continue to be as now provided until otherwise provided by law.*" Does this positive mandate leave any room for judicial interpretation of the quoted words as affording latitude to the insular courts to expand or shrink their own powers to suit their views of fit development of procedure or to meet any other exigency? Appellants can perceive none. Moreover the mandatory intent of the provision is further convincingly evidenced by the immediately ensuing provision, expressly investing the Legislature of Puerto Rico with authority, from time to time as it might see fit, to organize, modify, or rearrange the courts and their jurisdiction and procedure.

We do not overlook the phrase "within constitutional and statutory limits", by which this court qualifies the extent to which it declares it believes Congress intended to permit the insular courts to go in developing their procedure as they might see fit. In its context that qualification appears somewhat cryptic. We do not contend, and we presume no sensible person would contend, that constitutional and statutory limitations generally, or those with which we are concerned here, leave no scope whatever for court rules and decisions affecting judicial procedure. However, the question here is whether in this instance the Supreme

Court, in granting certiorari, did or did not violate and exceed limitations upon its powers and procedure definitely imposed by the Organic Act.

Manifestly, it is no answer to that question to say that the Organic Act permits the insular courts to do things about procedure which are not forbidden by law. The question is answered by this court with a blunt declaration in substance, as we understand the opinion, that the insular Supreme Court did not violate the Organic Act by granting certiorari herein, even if it had according to its own prior decisions possessed no power to grant certiorari in such a case at the time of the adoption of the Organic Act. Such an answer, we respectfully reiterate, is in direct conflict with the plain terms of Section 40 of that Act, and calls urgently for reconsideration and modification.

Referring to that part of the opinion on pages 15 to 19, holding in substance that, as a matter of purely local law the Supreme Court of Puerto Rico has jurisdiction under the insular statute (Sections 670 and 671, Code of Civil Procedure), to issue writs of certiorari to correct errors of inferior courts regardless of the nature of the error alleged, and therefore was not clearly in error in granting certiorari here, appellants believe that conclusion does violence to the very terms of the cited statute, which clearly define the writ as one to be sent by a superior to an inferior court in cases "where procedure is not according to the course of the law," and thus, in our opinion, clearly bar the employment of this form of review for alleged errors other than those of procedure.

We do not need to resort here to modern distinctions between adjective and substantive law. It is the basic statute itself that makes the distinction on which we rely, namely the distinction between procedural errors, such, for example, as deprivation of notice and hearing, on the one hand, and, on the other, errors of law committed in the course of an otherwise orderly and regular course of adjudication.

That the Legislature of Puerto Rico definitely intended to make such a distinction here is convincingly demonstrated, we think first by the employment of the specific word "procedure" in the above-quoted phrase; next by the extraordinary and summary nature of the remedy created, its common law characteristics, the inherent distinction between it and the ordinary appeal, and the absence of any reference in the statute to errors other than those of procedure as a basis for invocation of the remedy; and finally by the employment in the above-quoted phrase of the expression "not according to the course of the law."

With particular reference to the expression last quoted, it is unquestionable that the words "the course of" were inserted in the phrase for some definite purpose. They cannot be ignored, or construed to mean nothing, for that would contravene a fundamental principle of statutory construction. What, then, did the lawmaking body mean by saying "according to the course of the law," instead of saying simply "according to law?" We believe it is logical to answer that the words "the course of" were inserted to avoid the very interpretation adopted by this court, by the use of an expression clearly connoting the laws governing the course of orderly procedure followed by courts to assure due process of law; the legislature intending thus to make doubly plain its previously indicated intent that the authorized remedy is not to be available as a substitute for appeal to review alleged errors of law other than those of procedure.

We readily concede, as this court indicates, that the extraordinary writ of certiorari is especially appropriate where otherwise applicable, if the erroneous action of which the petitioner complains is alleged in good faith to have been beyond the legal power of the court by which it was taken. However, this does not grant that certiorari lies to bring up to the Supreme Court of Puerto Rico any case in which a petitioner may choose to attack the jurisdiction of an insular district court. The remedy in such a case re-

mains by appeal, unless the other special conditions necessary to warrant resort to the extraordinary method of review by certiorari are present. Otherwise, every defendant desiring to evade or delay justice could halt proceedings in the trial court for an indefinite period by the simple expedient of a petition for certiorari alleging errors of law ordinarily reviewable only on appeal, and coupling therewith a challenge to the jurisdiction of that court; a result obviously not contemplated or permitted by the law.

On page 19 of the opinion, among the grounds stated for the view that there was no abuse of discretion on the part of the insular Supreme Court in granting the writs of certiorari, this court mentions "the fact that a jurisdictional error of the District Court of Ponce is alleged," explaining parenthetically that "if case No. 782 automatically expired with the termination of the executorship on September 1, 1939, the district court had no jurisdiction to consider motions filed in that case thereafter."

In that connection appellants wish to remind the court that the appellees continued for more than two years after September 1, 1939, to recognize and treat the executorship as still in existence, and continued during that period to recognize the continued authority and jurisdiction of the district court to administer the estate in case number 782. It was not until November 26, 1941, that they first belatedly advanced their theory that the executorship had expired in 1939; and they never at any time prior to filing their petitions for certiorari in the insular Supreme Court made any contention that case number 782 had expired automatically with the belatedly alleged termination of the executorship. As late as October 27, 1941, in their petition for delivery of the estate to the heirs (R. 348-359), they submitted unqualifiedly to the jurisdiction of the district court in that case, and did not even suggest that the executorship had been terminated.

It seems paradoxical indeed to hold that a litigant can submit a motion or petition to an insular district court, call-

ing not for dismissal for lack of jurisdiction but for affirmative administrative action, and when the application is denied there, secure a review of that decision by the insular Supreme Court upon certiorari, by alleging that the district court was without jurisdiction to entertain the motion or petition at all. Equally paradoxical it appears, to hold that an insular district court was wholly without jurisdiction to entertain such a motion or petition, and yet that the insular Supreme Court, upon review by certiorari, could by judicial decree empower and order the powerless district court to grant the same motion or petition. Nevertheless, such are the apparent results of the judgments under review, and of the present opinion of this court.

In regard to this court's holding that as a matter of local law the ruling of the insular Supreme Court, to the effect that a petition under Section 556 of the Code of Civil Procedure constitutes a *sine qua non* of judicial administration, is not patently erroneous; while appellants think that holding wrong, they do not wish to burden the court with a mere reiteration or elaboration of such of the reasons for a contrary view set forth in their briefs previously submitted herein, as have been noted and overruled in the opinion of this court.

There is, however, a matter of special importance in that connection which is not mentioned in the opinion, and which therefore may have been overlooked. We refer here to the Brief for Appellant Mercado, Point Four, subdivision A, pages 46 and 47, quoting two separate insular statutes, each requiring in mandatory terms the judicial administration of estates under circumstances like those of the Mercado estate here involved. Considering those statutes, together with the long continued recognition by the district court and all parties concerned, of the judicial nature of the administration of the Mercado estate, and the other considerations presented by appellants' briefs in that connection, we are unable to perceive any reasonable ground for a conclusion that the ruling of the insular Supreme Court is not clearly and patently erroneous.

Jurisdictional and Other Questions Raised by Porrata.

As to the position taken by this court with relation to the appeal of the appellant Porrata in Puerto Rican Supreme Court No. 1517, appellants feel obliged respectfully to protest that it fails to meet or encompass the issues presented by that appeal.

Although Porrata's name is not expressly mentioned in the body of the judgment from which he appeals; and although upon a superficial examination of that judgment it may appear that it is directed exclusively to the executor; nevertheless it will be found that Porrata's name does appear in the preceding title of the case (omitted from the printed record) as one of the parties in the case adjudicated, and he was in fact a party to the case before the insular supreme court by reason of the service on him of the petition and writ, and by reason of his special appearance, answer and presence throughout the hearing in that court. This is conclusively borne out by the action of the insular supreme court in passing upon Porrata's rights in the findings and conclusions of its opinion, and in beginning its judgment with the words: "For the reasons set forth in the foregoing opinion."

Inherent in that judgment, are the findings and conclusions on which it is based, including: (1) *that the testimentary executorship and partitionership automatically expired in 1939;* (2) *that the partitioner failed to discharge his duties as such within the time allowed by law or the compromise contract of 1938;* (3) *that the compromise contract itself fully accomplished the requisite partitioning of the estate;* (4) *that no further partitioning or distribution of the estate was or is necessary,* and (5) by necessary implication that Porrata did not even earn or become legally entitled to payment of the fee of $20,000 payable to him under the compromise contract for his services as partitioner.

Those findings and conclusions are manifestly and patently erroneous, and the judgment they purport to support is inescapably wrong, but more important still, the Supreme

Court was without jurisdiction to make such findings and conclusions at all because Porrata had not been heard in the trial court. The executor could not validly execute such a mandate without the partitioning and distribution of the residuary estate by Porrata as directed by the testator, prescribed in the compromise contract, and required by law. Porrata manifestly was a necessary party to the proceeding of the objecting heirs to enforce immediate delivery of the estate, but had no hearing in that proceeding in the trial court where, and only where, his pleadings and evidence could have been received.

Incidentally the considerations just above outlined completely distinguish this case from *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632. There no judgment had been passed against the Boston Company in the district court. No attempt had been made there to adjudicate its rights. Here the lower court treated Porrata as a full fledged party and undertook to pass judgment against him, notwithstanding his protest that he had not been heard in the trial court; a plain error due no doubt in large part to the attempt of the insular supreme court to review this case by the hasty and extraordinary procedure of certiorari.

True, Porrata has been paid the amount of the fee in question, by the executor, but the item in the executor's accounts representing that payment has already been challenged by the appellees here (Br. for Appellees, Sub-Appendix No. A-1, pages 116-119), and Porrata faces the prospect of a demand and suit for refund of the amount, subject to ultimate adjudication by a court already practically committed by its opinion and judgment in this case, in which Porrata had no day in the trial court, to render judgment against him. Incidentally, in view of the considerations just noted, is it not manifestly unjust and misleading for this court, while declining to decide or even discuss the Constitutional question raised by Porrata, merely to say, as it does in the opinion under discussion, that Porrata says he has divided the estate among the heirs according to

the compromise contract, and admits that he has been paid for so doing?

In his last will and testament, Mario Mercado Montalvo, the decedent, entrusted to Porrata, as his "intimate friend," the duty of partitioning his residual estate among his heirs in accordance with the terms of his will. Porrata accepted that trust and undertook in good faith to fulfil it. The estate was large and diversified, the task correspondingly long and difficult, and the incidental responsibilities heavy. However, Porrata completed the work of preparing a draft of the proposed partition deed, and transmitted copies thereof to the several heirs on March 14, 1940. The two heirs who are the appellees here promptly objected to numerous parts of the draft, and refused to join in a formalization of the deed, or even to attend a conference with Porrata and the other heirs for the purpose of settling differences, and reaching a final agreement on the draft. They have consistently maintained the same attitude ever since.

The result is that, through no fault of Porrata, he has thus far been unable completely to fulfil his obligations to his dead friend, or to the heirs under the compromise contract. If the judgment from which he appeals, as interpreted by the court that rendered it, is permitted to stand, it is apparent that that obligation can never be completely fulfilled, for the judgment in effect declares the testamentary partitioner, along with the executor to have long since become *functus officio*. Consequently that judgment leaves the complex details of the distribution of the estate, as well as many other related controversial matters (all of which might and should, in the real interests of all concerned, be settled or adjudicated in one orderly proceeding), in a state of "confusion worse confounded," to be the subject of multiple, protracted, and expensive lawsuits, the probability of which has been definitely recognized by this court.

It should be borne in mind that the basic question raised by Porrata here is not one of local law, but is the constitutional and federal statutory question whether the

judgment of the insular Supreme Court deprives him of due process of law, by adjudicating his rights, duties and obligations without due notice and hearing. The rule of deference to the insular Supreme Court in matters of local law therefore has no application in the determination of that question. The familiar formulas "patently and clearly erroneous" and "inescapably wrong" cannot be used in disposing of that question. The test is simply whether the lower court erred in the particular indicated.

Nor do we understand this Court's statement in its opinion (p. 23) that "Porrata's presence here is not easy to understand." The facts upon which Porrata's appeal to this court is based are comprehensively outlined in his brief (Br. for Appellant Porrata, pp. 3-17), but we think it may tend to clarify his position here to restate briefly some of the more salient ones, as follows:

(1) Porrata was appointed testamentary partitioner in the decedent's will (R. 513);

(2) The four Mercado heirs, including the two appellees here, on September 9, 1938, joined with Porrata in the execution of the contract of compromise, under which Porrata incurred certain obligations and acquired certain rights (R. 524-558);

(3) The present appellees on October 27, 1941, petitioned the District Court of Ponce for immediate delivery of the estate to the heirs on the basis of the same contract of compromise, attaching a copy thereof to their petition, and quoting parts thereof, including those parts relating to Porrata's rights and duties (R. 348-359);

(4) Porrata on November 26, 1941, sought to intervene in that proceeding for the protection of his interests, serving on each of the heirs, and filing in the district court his "Report of the Testamentary Partitioner," with a copy of his draft of proposed partition deed attached, and requesting a hearing (R. 385-395);

(5) Appellees on December 4, 1941, moved to quash service on them through their attorneys, of Porrata's "Report" and petition to be heard above mentioned (R. 396-397);

(6) On December 14, 1942, at a hearing of which Porrata was not notified (R. 460) and at which he did not appear, the district court heard the petition for immediate delivery of estate and took it under advisement (R. 462-464);

(7) On March 24, 1943, the district court denied the petion for immediate delivery of estate (R. 467-476), expressly reserving judgment on Porrata's "Report," stating (R. 475):

> "We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been argued, and second, because in order to order either one or the other, as the parties may request, it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the coheirs on the date upon which he did so, and for that it is necessary that the partitioner and the objecting coheirs put the court in a position where it could decide this matter of fact. Both in this action as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved to the partitioner his right to allege whatever he deemed convenient 'in accordance with his duties and office'."

(8) Porrata was formally notified of the judgment last above mentioned, with copy thereof (R. 476).

(9) Appellees on April 22, 1943, caused to be served upon Porrata, a copy of their petition for certiorari in Supreme Court Number 1517, together with a copy of the writ issued thereon (R. 61-64).

(10) On May 24, 1943, Porrata filed in the Supreme Court in Number 1517, his "Special Appearance for the Purpose of Raising a Constitutional Question," pointing out that the

petitioners were seeking to have that court pass upon his duties and functions as partitioner of the estate, and that he had had no hearing on this matter in the district court, alleging that certiorari was not the proper remedy, and moving to quash the writ on the ground that to uphold the same would deprive him of due process of law in violation of the Organic Act and the Constitution of the United States (R. 67-69).

(11) Ignoring completely the Constitutional question raised by Porrata, the insular Supreme Court proceeded to pass upon his official status, rights and duties, as follows:

> "In another proceeding, case No. 802 of the lower court, instituted by Pedro M. Porrata, the latter obtained a judgment, on September 8, 1937, acknowledging his authority as Commissioner, and in that same proceeding the court granted him an extension until September 6, 1939, to perform his functions. Since then he has not been granted any further extension" (R. 100).
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> "Nor can it be maintained that the term of the executor [partitioner] is still in force and that the petition should be made in accordance with the draft of partition prepared by him. As we have stated, the executor [partitioner] in the present case was granted by the lower court an extension until September 6, 1939, to fulfil his office. He has neither sought, nor has he been granted, any additional term" (R. 100).
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> • • •
>
> "They [the heirs] apportioned among themselves the hereditary estate (subdivision (f) of the compromise contract) and the commissioner of partition, having this in mind, and, moreover, the fact that the heirs had 'agreed regarding the form and terms of the partition or distribution of the estate' (subdivision (l), compromise contract), likewise consented to said contract. Neither the executor nor the commissioner complied, either within the terms fixed or subsequently, with the terms of the contract" (R. 116).
>
> • • •

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor and the commissioner of partition had failed to perform its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves" (R. 119).

(12) And the foregoing findings and conclusions are embodied by express reference in the insular Supreme Court's judgment, which reads (R. 121; italics ours);

> "*For the reasons set forth in the foregoing opinion,* the petition herein is granted, and, therefore, the order made by the District Court of Ponce on March 24, 1943, is hereby vacated and another rendered instead ordering the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs Maria Luisa, Adrian, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render to them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days."

Those facts should, we think, explain fully why Porrata is here, asking this court to enforce his constitutional and federal statutory rights by telling the insular Supreme Court that it cannot pass judgment against a person who has not been accorded notice, hearing and due process. In this connection we respectfully ask this court to reexamine the Fourth Point in our Brief for Appellant Porrata, pages 31-34, and particularly the authorities there cited and quoted.

To the appellants here it will seem indeed a travesty on justice if these appellees are permitted to succeed in their long course of contentious, obstructive tactics and shifty double talk. Originally they contended vigorously that the

estate was under the law of special proceedings and judicial administration (*Porrata* v. *Court*, 53 P. R. R. 140; R. 856-863). Now they are contending just as strenuously that it is and always has been under the old Spanish law of the Civil Code. Although they brought Porrata into the case in the insular Supreme Court, there sought judgment against him, and still claim that he is bound by the judgment there, they insist on the other hand that he has no interest in the controversy. They alleged here that Porrata had been paid in order to support their contention that he has no litigable interest here, *and they did so with full knowledge that they had already challenged the legality of that payment.*

In its opinion of November 23, 1945, this court holds, in effect, that all that is said by the insular Supreme Court about Porrata is *obiter dictum*, but nevertheless affirms the judgment of that court expressly predicated upon reasoning that includes that same *obiter dictum*. As the lower court obviously thought it necessary to pass upon Porrata's status and rights, believed it had jurisdiction to do so, and did so, how can this court now properly presume that that court would have dictated the same opinion and judgment if it had thought it had no jurisdiction to pass upon Porrata's rights. Is it not more reasonable to suppose that that court, if it had understood and believed, as this court apparently now proposes to inform it, that it had no jurisdiction to pass upon Porrata's status and rights, would have remanded the case to the district court for the further procedure requisite to establish such jurisdiction before proceeding to interpret the law and the contract of compromise to which Porrata was a party, and to order the delivery of the estate on the basis of the conclusions reached.

For the reasons hereinabove indicated with relation to Porrata's appeal, we respectfully urge that that part of the opinion of this court pertaining thereto, also should be reconsidered, and that either the judgment below should be reversed outright or at least that the case should be re-

manded to the court below with instructions to send it back to the district court for further appropriate proceedings to determine after proper notice and hearing whether Porrata is a necessary party to this proceeding, and if so, to ascertain his related status, rights and duties. These are issues never properly tried out below, and which this court cannot properly undertake to adjudge upon the present record.

CONCLUSION.

The opinion of November 23, 1945, is clearly erroneous in vital particulars and a rehearing should be granted, whereupon the previous opinion and judgment of this court should be vacated and new ones entered reversing the judgments under appeal.

Respectfully submitted,

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December 20, 1945.

LEON, WEILL & MAHONY,
Of Counsel.

I, PEDRO M. PORRATA, of Ponce, Puerto Rico, now temporarily in the City of Washington, D. C., being one of the appellants and also one of the attorneys for the appellants in the above entitled case, hereby certify that the foregoing petition for rehearing is submitted in good faith and not for delay.

PEDRO M. PORRATA.

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 908.

MARIO MERCADO RIERA, EXECUTOR, *et al.*,
Petitioners,

v.

MARIA LUISA MERCADO RIERA DE BELAVAL,
et al., Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

PETITIONER PORRATA'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

To emphasize the separate nature and importance of the federal constitutional question raised in this case by Petitioner Porrata, he respectfully asks leave to present this separate reply to respondent's brief in opposition.

I.

STATEMENT OF FACTS.

Respondents' brief in all consists of 116 pages. The supposed statement of facts, which is largely an amalgam of erroneous and misleading statements and argument, covers 36 pages. The part styled "argument", 50 more. A motion for dismissal, containing little but more argument, covers 24. However, the reasons why Porrata is petitioning this high court to grant certiorari to review this case remain plain and convincing, despite all attempts on the part of respondents to becloud the issues.

A.

This case started with a petition filed by respondents before the District Court of Ponce, alleging Porrata's rights and duties under the compromise contract; and the refusal of Judge Gadea to pass upon those rights and duties because of lack of notice and hearing.

This case originated in the Ponce District Court, wherein the Mario Mercado Montalvo estate was being administered judicially (See "Chronology," Pet. and Br., pp. v to xii). The petition originating the case, was filed by respondents (R. 348-359). It was obviously based on the contract of compromise of September 9, 1938, signed by Porrata, the executor and these respondents. Said petition plainly alleges Porrata's rights and duties under said contract of compromise (R. 350 and 354-355).

Was Porrata served with a copy of respondents' petition for delivery filed before the district court? He was not. What happened then? It happened thus: Judge Gadea of the District Court of Ponce, naturally, refused to pass upon those rights and duties of Porrata alleged by respondents in the petition, because Porrata had first to be accorded his constitutional and even human right to notice and hearing, and furthermore, because when Porrata, desiring to save time, filed a motion to be heard in the proceedings on No-

vember 26, 1941 (R. 385-395), respondents objected to the granting of the hearing applied for by Porrata (R. 81-82).

B.

Let us quote the exact words with which the district court passed upon the anomalous situation thus presented, as follows (R. 475).

"It has been argued by the co-heirs don Adrian and doña Maria Luisa in their brief, and orally, that aforesaid partition should have no effect whatsoever, as it was prepared and submitted after the date upon which it was supposed to have been delivered under the provisions of the contract of compromise heretofore mentioned.

We believe that no order should be entered with respect to the partitioner's report because, first, the motion with respect to the quashing of the notice of the partitioner's report heretofore set forth has not been set down for hearing and has not been argued, and second, because in order to order either one or the other, as the parties may request, *it is necessary, first, to consider whether the partitioner had any just cause for rendering his report to the co-heirs on the date upon which he did so,* and for that it is necessary that the partitioner and the objecting co-heirs put the court in a position *where it could decide this matter of fact. Both in this action as well as Number 1213, acceptance with benefit of inventory, etc., the Honorable Judge Sepulveda reserved the partitioner his right to allege whatever he deem convenient 'in accordance with his duties and office'.*" (Italics supplied)

It is manifest from these words of Judge Gadea that respondents were doing something very unconventional in law and equity, i. e. *asking a court to pass upon the rights and duties of a person, while actively objecting to the granting of notice and hearing of the very same person whose rights were to be adjudicated.*

C.

Having failed in their attempt to secure action without notice and hearing against Porrata in the district court, respondents used the irregular and improper proceedings in certiorari to secure same in the supreme court.

Faced with the conclusion of the District Court of Ponce, the court of original jurisdiction, that Porrata's rights and duties could not be passed upon without notice and hearing, respondents proceeded to apply for a writ of certiorari before the Supreme Court of Puerto Rico, again alleging in their petition, Porrata's rights and duties (R. 40-58).

In subdivision 6 of the petition (R. 41), respondents allege:

> "*The testator appointed as commissioner of partition of the estate, simply and without specifying any term, Pedro M. Porrata.* The latter secured from the lower court a certificate evidencing his appointment in civil proceedings No. 802, dated September 6, 1937. Before a year had elapsed after having qualified, August 19, 1938, he was granted, on motion in that same proceedings, a judicial extension of his appointment for a further year, which expired in September, 1939, contemporaneously with the office of Mario Mercado Riera, *then testamentary executor, without having sought or obtained in any way any further extension as such commissioner of partition.*" (Italics supplied.)

In subdivision 10, letters (l) and (m) they quoted the corresponding paragraphs of the contract, themselves supplying the italics, as follows (R. 46):

> "(l) Don Pedro M. Porrata, who witnesses this act in his capacity as testamentary commissioner of partition of the estate left by don Mario Mercado Montalvo, *bearing in mind that the heirs don Mario, doña Margarita, doña María Luisa and don Adrián Mercado Riera, are in agreement regarding the manner and terms of the partition or distribution of the estate left by the ancestor, don Mario Mercado Montalvo, and in regard to everything in connection thereof (as evidenced by*

the present compromise contract), accepts said contract as if he were a party thereto in all its stipulations, terms and conditions, and so far as the same affects him as commissioner of partition of the said estate, and undertakes to abide thereby in conformity with the literal text of the present contract, without modification, addition or alteration whatever in the draft of partition of the hereditary estate referred to in the following subdivision".

"(m) The deed of partition of the estate left at his death by don Mario Mercado Montalvo shall be executed by the said commissioner of partition and the aforesaid four universal heirs. Said don Pedro M. Porrata, who witnesses this act, *undertakes to perfect the said draft of partition within ten days from the payment of the inheritance tax in the present case and exclusively in accordance with the terms of this contract, which shall not be enlarged except as regards the description of the hereditary estates or properties, nor modified, or added to, or altered in any way; . . .*"

In subdivision 12 (R. 48), they alleged:

"As appears from the compromise contract recited in paragraph 10, supra, the heirs of don Mario Mercado Montalvo accepted the inheritance on or prior to September 9, 1938, and on that date and by said compromise contract, expressly agreed upon the undivided allotment of the hereditary estate (ante, page 44), with the consent and acceptance of the then commissioner of partition, Pedro M. Porrata (ante page 46), as well as with the consent and acceptance of Mario Mercado Riera, who, at that time, acted also in his capacity as simple executor."

In subdivision 20, paragraph (E2), the petition alleges (R. 54):

"2. Because the legatees themselves in the present case were estopped from making such allegations by virtue of the testamentary prohibition transcribed in paragraph 4 of this certiorari petition (page 41);"

The writ was issued upon respondents' petition, and respondents proceeded to notify both petition and writ to Porrata (R. 61-62). In serving this notice, respondents were unquestionably guided by Rule 69 of the Supreme Court of Puerto Rico (335 Code of Civil Procedure, 1933 Ed.) which requires petitioners in certiorari to notify all parties interested in the proceedings below.

D.

Porrata alleged before the Supreme Court of Puerto Rico that said court lacked jurisdiction to pass upon his rights and duties as there was no notice and hearing before the District Court of Ponce where the case originated and because there was no jurisdictional error giving rise to the extraordinary remedy of certiorari.

Upon his receipt of the notification of the petition and writ served by respondents, Porrata filed in the insular supreme court, May 24, 1943, his *Special Appearance for the Purpose of Raising a Constitutional Question* (R. 67-96), alleging that respondents were seeking to have the supreme court pass upon questions affecting him, concerning his duties and functions and rights, without notice and hearing before the District Court of Ponce. Porrata's "Special Appearance" was accompanied by a copy of the "*Special Appearance Requesting that the Service or Notice of a Purported Report of the Testamentary Partitioner* (Porrata) *be quashed*" (R. 81-82) filed by attorneys for respondents to prevent Porrata being heard before the District Court of Ponce upon the issues raised by their own petition for delivery. Porrata further alleged (R. 95) that there was no procedural or jurisdictional error to give rise to the certiorari proceedings; that the court had no jurisdiction to pass upon his rights and duties (R. 67-69); that he was not notified or heard before the court of original jurisdiction (R. 91-92); and that the case should be remanded for further action according to the opinion of the district court; but Porrata was overruled by the insular

supreme court in its opinion and judgment (R. 100, 103, 104, 114-115).

See original petition and brief, pages 47-50, where quotations are made from the supreme court opinion to show how decisively that court passed upon Porrata's rights and duties without notice and hearing.

E.

The Circuit Court of Appeals, aware of the erroneous action of the Supreme Court of Puerto Rico, coincides with the position assumed by the District Court of Ponce, but by failing to reverse, sanctions the infringement of Porrata's constitutional rights; and thereby creates a constitutional question requiring examination by this court.

The Circuit Court of Appeals substantially agrees with the opinion of the Ponce District Court, and disagrees with the insular supreme court, but instead of reversing the judgment, waives the fundamental question of notice and hearing and allows the judgment of the insular supreme court, rendered in violation of the Constitution, to stand, instead of adopting the logical position taken by the District Court of Ponce, which court refused to render judgment in the case until a hearing was accorded to Porrata.

F.

The facts of this case clearly reveal a conflict in the courts below and even a plain confusion in a matter concerning the fundamental rights of people, requiring examination by this court.

The facts summarized above, are the facts of this case, regarding the special constitutional question raised by Porrata.

With those facts before it, this court can hardly be misled by respondents' frantic efforts to avoid a review here upon the technical ground that no federal question is in-

volved. The pursuit of such strategy has now become chronic among Puerto Rican litigants with unsound cases, seeking to defeat the rights of appellate review authorized by Congress. In the present case, among the several federal questions involved, this one of deprivation of property and rights without notice or hearing is especially outstanding in clarity and force. As shown by the record, and above noted, its presence in the case was definitely pointed out by the district court in the very opinion and order reviewed by the insular supreme court on certiorari, and was again repeatedly brought to the attention of the insular supreme court by Porrata in the course of that review. It was entertained by the Court of Appeals, and was evaded there by recourse to an erroneous interpretation of the judgment of the insular supreme court, manifestly contrary to its intent and purpose, as not binding or affecting Porrata. The question is still here in the case, unanswered, and demanding settlement by this tribunal, the final arbiter of American justice.

II.

QUESTION PRESENTED BY PORRATA.

Could respondents, María Luisa and Adrián Mercado Riera, file in the testamentary proceeding in this case, a petition under a contract (the contract of compromise of September 9, 1938) to which they were co-signors with partitioner Porrata; allege in said petition Porrata's rights and duties and a violation of those duties under the contract involved; when Porrata tried to intervene and be heard, object to the hearing asked for; while so objecting, petition the court for a judgment against Porrata (*supra* p. 2); when the district court refused to render the judgment petitioned for by respondents (*supra*, p. 3), go to the Supreme Court of Puerto Rico asking for review by certiorari and petitioning that supreme court to render judgment against Porrata without allowing Porrata the right to introduce pleadings and evidence as required by

the universal principle of humanity and justice known as due process, before the only tribunal with power to receive such pleadings and evidence under Puerto Rican Law (which in this case was the District Court of Ponce); and upon such procedure lawfully be awarded the judgment against Porrata thus sought for and obtained in the insular supreme court?

III.

PORRATA'S POSITION.

Petitioner Porrata contends:

That the opinion of the Circuit Court of Appeals and the conclusions reached therein required a reversal of the judgment of the Supreme Court of Puerto Rico; that the proceedings before the insular supreme court were so contrary to justice and right that they cannot be affirmed without deprivation of the constitutional rights of Porrata; and that justice calls upon this tribunal now to exercise its power of supervision and adjudicate the real issue involved herein, *as to whether the rights of a person can be passed upon in a jurisdiction under our flag without notice and hearing.*

IV.

ARGUMENT.

G.

The lengthy and involved arguments in respondents' brief cannot obscure the fundamental issue of lack of notice and hearing.

Answering in bulk all the turmoil of inapposite, unsound and confusing arguments presented by respondents, we repeat substantially what Porrata said in his "Special Appearance for the Purpose of Raising a Constitutional Question" (R. 67-69), and in his answer to the petition for certiorari before the Puerto Rico Supreme Court (R 83, where the special appearance is reproduced; R. 90-92, where the lack of notice and hearing is reasserted; R. 95, where Por-

rata prayed for the remanding of the case in order that he might be heard upon the questions raised over the execution of the deed of partition), when we say again here that there is one paramount question to be decided by this court at the start—*whether the rights and duties of Porrata could be adjudicated by the Supreme Court of Puerto Rico without notice and hearing before the District Court of Ponce, the court of original jurisdiction.*

The Puerto Rican Supreme Court patently erred in not recognizing *Porrata's right to notice and hearing before the District Court of Ponce.* For if there was no notice and hearing, how could the Supreme Court of Puerto Rico render any judgment in the case passing upon Porrata's contractual rights and duties, or take any action constitutionally valid against Porrata? The District Court of Ponce, the court of original jurisdiction, thought that Porrata had to be heard before any judgment could be rendered.

Was the insular supreme court entitled to reverse the district court? It was not. Its opinion and judgment passing upon Porrata's rights and duties is patently erroneous in every respect, and should not be allowed to stand, as it was deliberately procured by respondents in violation of Porrata's constitutional rights.

It certainly would be something new under the law, if we were not entitled to maintain that the opinion of the Ponce District Court follows the Organic Act and the Constitution, when that court refuses to charge Porrata with the violation of a contract without according him a hearing, and that the insular supreme court action affecting Porrata's rights, under the circumstances shown, constitutes an obvious infringement of constitutional law.

H.

Respondents, who put Porrata's rights and duties in issue in this case and procured adjudication thereof without notice and hearing, are now attempting to evade responsibility for so doing by falsely alleging that it was the executor who first put those rights and duties in issue.

Respondents deviously now contend that it was the executor who first brought Porrata's duties before the court (Resp. Br. in Opp., p. 47). That contention is not only immaterial but also flagrantly incorrect. *It was respondents themselves who deliberately alleged those rights and duties in their petition for the delivery to them of their shares of the estate* (R. 354-355). By alleging Porrata's duties and rights, and charging derelictions against him, they naturally forced an answer, and cannot deny now having themselves introduced the resulting issues. However, they could not do otherwise, as the petition last mentioned was based expressly on the contract of compromise, signed by Porrata and the heirs (R. 348-359).

Out of ten pages covered by the said petition, over 6 pages are occupied with quotations from the compromise contract; all of said quotations affecting profoundly, directly or indirectly, Porrata's rights and duties. Moreover: That petition for delivery was, more than anything else, a petition for the interpretation of the contract of compromise, to which contract Porrata was the paramount party, especially in relation to the matter in issue before the court, and as anything said or done by the interpreting court necessarily would bear on the co-signors, Porrata was logically considered an indispensable party.

Attention is invited to the case of *Nicot* v. *Valdecilla* et al. 28 P. R. R. 524, at page 527, where, in an action for specific performance of a contract, it is held that all the co-signors are necessary parties. In that case, which is not nearly so strong as ours in this respect, no interest was shown in the defendant Rivera, but, nevertheless, as Rivera was a co-

signor with Valdecilla and the plaintiff, he was adjudged to be a necessary party. In our case, Porrata's rights and duties are specifically alleged by respondents themselves, together with an allegation that he failed to perform his duties, and, therefore, his presence in the proceedings was absolutely indispensable. Such was the understanding of both the district court and the Supreme Court of Puerto Rico; the only difference between them in that respect being that the district court required notice and hearing, while the insular supreme court ignored its absence.

In other words: respondents who, as indicated above, alleged Porrata's rights and duties in their petition, undertake now to argue that Porrata was not a necessary party to the proceedings, contrary to the obvious understanding of both local courts, and to respondents' own original theory of the case. That, in any event, is immaterial now, because there is a judgment against Porrata; but let us examine this question further.

Respondents' own petition for the delivery of their shares of the estate, we repeat, *specifically alleges Porrata's rights and duties* (R. 354-355). The District Court of Ponce, which court had been dealing with the estate from the start, held that it could do nothing about Porrata's rights and duties without hearing Porrata (R. 474-475). The petition for certiorari filed by respondents in the Supreme Court of Puerto Rico, alleges Porrata's rights and duties (*supra*, pp. 4-5); and respondents in their brief before the Supreme Court of Puerto Rico insisted and prayed for a judgment against Porrata. Let us see what respondents said in that brief:

> "A particular of importance to be taken into consideration is that the so-called partitioner's deed whose previous perfection was alleged as a prerequisite for the delivery of the estate to the interested parties, was not prepared within the time nor subject to the compromise contract, and it was only projected after the office of commissioner was allowed to expire.
>
> The executorship expired by course of law in September 1939. (Point 1) The functions of the partitioner

expired also on that date, accepting *arguendi gratia* that they did not expire by virtue of the adjudication of the estate by and between the interested parties in September, 1938, as already shown. The terms of the partitioner, as that of the executor, are subject to the same provisions. 96 Jurisprudencia Civil, pags. 599, 601-602; Sents. de febrero 24, 1927 y febrero 22, 1929 173 J. C. 699 y 187 J. C. 807).

Mr. Porrata agreed to prepare the said partitioner's deed ten days after the payment of the inheritance tax. This payment was made extemporaneously on February 29, 1940, (Ex. 8). [Ours: misleading because it was really made on the date of the Treasury receipt, March 9, 1940, and respondents knew the reasons why]

Assuming personality and capacity as partitioner in Mr. Porrata in February 29, 1940, he should have prepared the deed ten days after, on or before March 10. He came to execute it on March 14. [Ours: Deliberately misleading because the deed was prepared even before March 9, 1940, as shown by the record. The meeting could not be had March 9, as indicated herein, only because of respondents' own solicitation. What happened on March 14th was that the partitioner advanced the copy at the solicitation of respondents' attorneys.] And the text of the deed conflicted with the literal text of the compromise contract that the partitioner accepted not to alter except in regard to the description of the real estates or inheritance . . . Respondents' Brief before the Supreme Court of Puerto Rico, pages 85-86.) (*Translation and comments in brackets ours.*)

Moreover: The Supreme Court of Puerto Rico, to be able to decide for respondents, found it necessary to declare that there was no judicial administration, that Porrata had forsaken his rights and failed in his duties under the contract, and that his term for the execution of the deed of partition had expired (R. 100, 103, 104; 114-115; 116; 119; 121); thereby obviously deciding that Porrata was an indispensable party. Of course he was so, for the contract of compromise was also his, and could not be interpreted without him.

Therefore, Porrata was a party entitled to be heard in the trial court for more than one reason plainly appearing from the record and the decisions of Puerto Rican courts. He was brought into the picture by these respondents; his rights were put in issue by specific allegations of respondents themselves.

I.

Respondents' brief in opposition seeks to induce this court to err by deliberately ignoring the fact that Porrata tried to intervene and present evidence in his favor before the district court, to which respondents objected.

Respondents allege that Porrata did not try to intervene in the proceedings before the District Court of Ponce (Resp. Br. in Opp., pp. 14-15. They ignore the fact that Porrata was there and did try to intervene, though respondents did not join him as a party to their motion for delivery (R. 385-395; alleging that proceeding No. 782, wherein they were seeking to have Porrata's rights and duties adjudicated behind his back, was already terminated. The legal position thereby taken by respondents, objecting to Porrata coming into the proceedings while asking for adjudication against him, is almost incomprehensible; *for it requires a full stretch of the imagination to find any justification for their attempt to procure the adjudication of a person's rights and duties in a proceeding, in this case 782 of the District Court of Ponce, while the proponents themselves, respondents herein, were not only withholding notice, but objecting to the granting of hearing to the very same person, Porrata, to be adversely affected by the judgment sought.*

This United States Supreme Court said in *Powell* v. *Alabama*, 287 U. S. 45, about the right to notice and hearing (p. 68):

> "It never has been doubted by this court, or any other so far as we know, *that notice and hearing are preliminary steps essential to the passing of an enforceable*

judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended *'law which hears before it condemns,'* have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy,* 169 U. S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the *'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'* And Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall, 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; *it is judicial usurpation and oppression, and never can be upheld where justice is justly administered'.* Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so." (Italics, except in citations, supplied.)

J.

The intention of respondents to induce this court to err appears still more manifest when they deliberately ignore in their brief the fact that they not only alleged Porrata's rights and duties in their certiorari petition, but also served Porrata therewith, recognizing his interest in the controversy and giving rise to the constitutional question.

Respondents on page 20 of their brief in opposition again attempt to lead this court into error by charging that Porrata voluntarily intervened in certiorari 1517. They even cite the record in support of that unfounded and deliberately misleading statement. Let us state the facts: Porrata was brought into the picture by respondents' petition quoting the contract of compromise provisions relating to

Porrata's rights and duties, alleging failure on his part to discharge those duties, and by service of process on Porrata. What the record shows is this: Respondents on March 7, 1943, served Porrata with papers headed and purporting to be Certiorari 1517. So respondents stated in the return filed with the Secretary of the insular supreme court, under rule 69 of that court, that they had notified Porrata of Certiorari 1517. However, Porrata discovered that the copy of the petition served upon him with the writ of certiorari in No. 1517 was not a copy of the petition in that case at all, but was a copy of a petition in certiorari No. 1518. Porrata called attorney Poventud's office and informed him that respondents had notified the Supreme Court of having served him Certiorari 1517, when actually the heading of the papers served was 1517, but the papers corresponded to 1518. Respondents immediately served the papers corresponding to the heading of 1517. The return clearly bears us out. It reads (R. 61-62):

"Civil No. 1517.

RETURN OF SERVICE OF NOTICE.

(Filed in the Supreme Court of Puerto Rico April 24, 1943)

"Heriberto Febus Quintero, [Attorney Poventud's Secretary] under oath, deposes:

"That he is of lawful age, that he has no interest in nor is a party to the above entitled cause; that on April 7, 1943, Pedro M. Porrata, Esq., acknowledged notice of the petition in the above entitled cause [civil action 1517, as indicated by the title], said acknowledgment of notice together with others, were filed in the Supreme Court on April 19, 1943; [clearly by the 19th of April the supreme court was already informed that Porrata had been served with certiorari 1517], that yesterday, Thursday, April 21 [two days after the Supreme Court was misinformed], Pedro M. Porrata, Esq. advised the undersigned by telephone, as Secretary to José A. Poventud, Esq. who is ill, that the petition which he received on April 7th, referred to cer-

tiorari No. 1518 [that is, called their attention to their error], *re* nullity of notice for delivery of properties, sale, etc. and not to certiorari No. 1517, re: delivery of hereditary properties [which respondents informed the court they delivered to Porrata on April 7], etc.; *that through instructions given by José A. Poventud, Esq., as attorney for the petitioners Adrian and María Luisa Mercado Riera,* I delivered, on this day April 22, 1943 [so Poventud wanted to leave no doubt that he intended to serve 1517 on Porrata], to Pedro M. Porrata personally and at his offices located on Concordia Street, corner of Luna, in Ponce, P. R., it being about 10:30 A.M., copies of the petition and order with respect to the certiorari record in the above entitled cause, with respect to delivery of hereditary properties; and the undersigned sets forth that Pedro M. Porrata, received the copies of the petition and order in certiorari No. 1518 (nullity of notice for withdrawal of funds in deposit, sale of properties, etc.), which he states were delivered to him by the undersigned on April 7, 1943.

H. Febus, *Declarant.*

Ponce, P. R., April 22, 1943." (Comments in brackets, and italics, supplied.)

Porrata, therefore, came into the proceedings before the Supreme Court of Puerto Rico because respondents put in issue his rights and duties in their petition for certiorari, regarded him as a party, and served the certiorari petition on him. And respondents' attorneys knew that in the Supreme Court of Puerto Rico no evidence could be introduced by Porrata. They cannot complain, therefore, of Porrata's raising the constitutional question in that supreme court and contending there that the case ought to be remanded *for lack of notice and hearing before the proper court,* in accordance with the district court's opinion. Porrata raised that constitutional question, not only in his special appearance, but more specifically in the answer (R. 67-69, R. 83 top; R. 90-92; R. 95, where Porrata expressly prayed for the remanding of the proceeding for a hearing on the partitioner's report).

Thus it is clear that the constitutional question was raised, reserved, and all the way carried through in both insular courts, to the end in the special appearance and answer. That question is privileged and fundamental. The purpose of the Organic Act and the Constitution cannot be defeated or ignored on shallow pretexts, nor can any pretexts be considered valid here where Porrata was and is being affected by a judgment clearly rendered without notice and hearing in the only court endowed under Puerto Rican law with original jurisdiction to receive evidence and assure to the parties the full and fair hearing required by due process.

K.

Respondents in their brief, are clearly informing this court that they are prepared to use the judgment in issue rendered without notice and hearing, in future litigation against Porrata, although Porrata was not allowed to participate or introduce evidence in his defense.

On page 52 of respondents' brief in opposition we find the following argument:

> "The foregoing plainly shows that appellant *Porrata's sole interest, as an intervenor in No. 1517, is in the effect of the decision* therein as a precedent in possible future litigation among the co-heirs, *concerning the new final supplemental accounts from March 5, 1940 to August 31, 1943.*"

If the words of a litigant used in order to induce action by a tribunal are to be given any meaning at all, those last above quoted from respondents' brief, should induce this court to grant this writ of certiorari and examine respondents attempt to use the judiciary to suppress and deny the rights of the individual. Here we are faced with a judgment of the Supreme Court of Puerto Rico obtained against Porrata without notice and hearing by the deliberate action of respondents, and in the quotation above set above, we

are implicitly informed of the intention of respondents to use that judgment to Porrata's injury. Thus, in effect, they admit deliberate design in their effort, successful thus far, to prevent Porrata from introducing in the record of this case his evidence to the effect that he fully fulfilled and complied with his obligations under the compromise contract.

It should be kept in mind that the constitutional question raised by Porrata represents a complaint against the appellate courts below going ahead and making a case to his injury on pleadings alleging, and unilateral evidence tending to prove, Porrata's infraction of a contract, and against their undertaking to interpret and apply the provisions of the contract, without allowing Porrata the corresponding right to answer the imputations against him. Respondents did not object before the insular supreme court to the constitutional question there raised by Porrata in his special appearance. The issue was provoked by respondents from the beginning; it is there in the case, a vital and decisive issue of constitutional law, decided in Porrata's favor by the District Court of Ponce, against Porrata by the Supreme Court of Pureto Rico, and evaded by the Circuit Court of Appeals.

L.

IMPORTANT.

To demonstrate still further the justice of granting this petition for a writ of certiorari, we invite the attention of this court to the fact that respondents are already attempting to use the judgment of the insular supreme court in this case as constituting res-adjudicata against Porrata. Let us explain.

Judge Sepulveda, in his judgment upon the settlement of the original accounts in district court No. 782, declared (R. 425-26):

> "For the reasons set forth above, in addition to articles 588, 589, and 592 of the Code of Civil Procedure (1933 Ed.) the court is of the opinion that a final order

should be entered modifying the final accounts of the executor in conformity with the decisions contained in the present statement of the case and opinion; providing that, according to law and justice, the surplus resulting from said modification of the final accounts, in cash or in real properties, be divided among the persons entitled to it, to wit, the four co-heirs of testator Mario Mercado Montalvo, whose names are Mario Mercado Riera, Margarita Mercado Riera, Adrián Mercado Riera and María Luisa Mercado Riera, after payment of the debts of the decedent and the expenses of administration; all without any special taxation of costs, that is, that each one of the litigating parties pay their own cost and the fees of their respective attorneys."

On appeal before the Supreme Court of Puerto Rico, on another incident, respondents are now challenging this part of Judge Sepulveda's judgment, and alleging that in the case now before this court, the Supreme Court of Puerto Rico declared the partition already completed and, therefore, Porrata ousted; and respondents are citing in support of that contention the following excerpt from the insular Supreme Court's opinion in this case (R. 119; italics ours):

"If the heirs in the case at bar had already accepted the inheritance and agreed upon its distribution, pursuant to the compromise contract of September 9, 1938, the fact that the executor *and the commissioner of partition had failed to perform* its terms should not be ground for claiming, several years afterwards, that the heirs are not in agreement as to the way in which they should distribute the estate among themselves. Nor should the appeal pending regarding the order made by Judge Sepulveda approving the final accounts submitted by the executor be ground either, for, apparently, according to said contract (Subdivision (g)), such accounts covered only 'the fruits, rents and products, or any other accretions of the estate . . . and any balance resulting therefrom shall be distributed among the aforesaid four heirs of the ancestor, share and

share alike'. We say 'apparently', because as admitted by the petitioners in their brief, 'The concern for clearing up this particular constitutes, among others, one of the grounds of said appeal'."

Thus respondents are now insisting before the Supreme Court of Puerto Rico in another proceeding, that the judgment of that court in this case means the ousting of Porrata as partitioner and that the estate is already distributed among the heirs, because of Porrata's failure to do so.

In the appendix to this brief (*infra*, pp ——), we are inserting the Spanish text of respondents' argument in their brief in the new incident above mentioned, filed with the Secretary of the Supreme Court of Puerto Rico in June, 1944, together with an English translation thereof, to furnish additional proof that the writ now sought by Mercado and Porrata should be issued, and that the appellate court judgments below should be reversed for violation of the due process clause.

In other words: the contract of compromise contains general rules of partition, but it does not constitute the partition itself. Judge Sepulveda and Judge Gadea of the District Court of Ponce, and the Court of Appeals, all agree to that. To interpret that contract validly in detriment of Porrata's right to partition the estate, Porrata must first be heard. As he was not heard, the insular supreme court judgment is void. In not so declaring lies the error of the Court of Appeals, justifying the granting of this writ and, in due course, the reversal of the judgment of that court.

M.

Examples of points upon which Porrata would have been able to present evidence and argument had he been allowed notice and hearing before the proper court.

The Supreme Court of Puerto Rico, in its opinion upon a record devoid of Porrata's evidence, accepts respondents' allegations, and finds that Porrata violated the contract

of compromise, but if Porrata had been accorded his right to participate and introduce evidence before the District Court of Ponce, he would have proven (challenging respondents' devious contention that Porrata did not prepare the proposed partition within the time provided in the contract), that the inheritance tax was actually paid on March 9, 1940, the date of the official receipt (R. 583-588); that even before March 9, Porrata prepared the partition deed and visited the respondents' attorneys; that he received a telegram from Celestino Iriarte, one of those attorneys, asking for the postponement of the meeting for reason of an injury received while riding on horse back, and that there was no objection to that postponement to March 16, 1940 (R. 770-771 and 603), a date still within the limit set in the contract. He would have been able also to show that he kept on insisting on compliance and complying at all times with his duties under the contract, which, under Section 1044 of the Puerto Rico Civil Code, is the paramount and fundamental law between the contracting parties.

As shown by the contract of compromise (R. 543-545) Porrata and the four heirs contracted that "the partitioner's report on the estate . . . shall be executed by aforesaid partitioner and aforesaid four universal heirs" and Pedro M. Porrata undertook "to have said partitioner's report prepared within a term of ten days from the payment of the inheritance tax in this case and in accordance with the provisions of the contract".

We find, therefore, Porrata contracting with the Mercado heirs, under Puerto Rican law, for the preparation of a document to be executed by him and four other persons.

Now, what is the nature and effect of a contract in Puerto Rico, and for that matter, we believe everywhere in the world? A contract in Puerto Rico has the nature and effect of private legislation between the contracting parties, who are bound by it as by the strictest and severest rule of public law that might be enacted. Such is the conclusive intent and effect of the following sections of the Civil Code.

Section 1044, Civil Code of P. R., 1930 Ed.

> "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations."

Section 1206, ib.

> "A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service."

Section 1230, ib.

> "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

But it may be of some interest in passing to consider and have in mind, that the contract between Porrata and the Mercado heirs for the preparation of the deed of partition for the delivery of the estate within the term of ten days from the payment of the inheritance tax, was not conceived out of the caprice of the parties, but to fit precisely within the requirement of local inheritance tax laws.

Section 1021 of the Civil Code, 1930 Edition, provides that the partition legally made, confers upon the heirs the ownership of the estate awarded to them. It reads as follows:

> "*Section 1021.* A division legally made confers upon each heir the exclusive ownership of the property which may have been awarded to him."

But no partition can be considered as legally made until the inheritance tax is paid, according to the following provisions of the Puerto Rico Laws (Sec. 12, Act of Aug. 29, 1925, as amended by Sec. 5, Act No. 20, Laws of 1933, p. 234):

> "Except in such special cases as are determined in section 5a of this Act, no court shall approve the partition or distribution of the estate of any decedent or

> allow any final settlement of the accounts of any executor, administrator, trustee or person administering any estate, unless the special receipt or receipts as provided in section 11 of this Act, have been produced and exhibited; and no notary shall issue, authorize or certify any instrument of award, partition, distribution, alienation or hypothecation of property unless such receipt or receipts issued by the Treasurer are presented;" . . .

It is obvious, therefore, that the contract was framed as it was, with relation to the time for preparation of the partition deed, because of express statutory requirements rendering an earlier settlement and distribution of the estate unlawful, giving the contract the double legal status of law between the parties arising from statutory law.

Since there was law created by the parties consisting of their contract to govern their relations, the insular supreme court was bound to rest upon that law in so far as any of the parties to the compromise contract were concerned. Instead, that court digressed into interpretation of inapplicable statutes to determine that the term of office of Pedro M. Porrata for the preparation of the deed of partition was not ten days from the payment of the inheritance tax, but a term equal to that of a non-judicial executor. The court disregarded the paramount and vital facts that there was a contract binding upon the four heirs and Porrata, and that the duties assumed by Pedro M. Porrata under the contract of compromise were not merely those of a civil law partitioner, but were contractual duties to be examined, interpreted and adjudicated according to the contract.

More than that: The history of this litigation itself shows that everything depends on the contract:

1. The motion of these respondents for the delivery to them of their shares of the estate (R. 350; 354-355) specifically alleges the contract and Porrata's rights and duties under the same. Over half of the paper used is

dedicated to the insertion of portions of the compromise contract (R. 348-359). Out of 10 pages, almost 7 are used for that purpose.

2. The denial by the District Court of Ponce of the motion last mentioned was by no means absolute and has been misinterpreted in that regard by these respondents and the appellate courts below. It was the necessity of giving a hearing to Porrata, with relation to his compliance with the terms of the compromise contract, and the necessity of passing upon the deed of partition, that constrained the district court upon the questions in issue (R. 474-475).

3. The petition in certiorari filed to review the order of the district court, specifically alleges the contract of compromise, and specifically alleges the rights and duties of Porrata under it.

4. Even the opinion of the insular supreme court proceeds largely upon considerations of the contract, although it turns finally upon inapplicable statutes.

SUMMARY.

We perceive no useful purpose to be served by elaboration of this reply brief, to set forth the obvious refutations of many of the arguments and asseverations, some immaterial, some unfair, some substantially incorrect in manifest particulars, contained in respondents' brief. The essential facts and considerations may be summarized briefly as follows:

(1) In the District Court of Ponce, a petition was filed by these respondents within the testamentary proceedings of an estate which obviously was being administered judicially, seeking an order requiring immediate delivery to them of their respective shares of the estate, without the official partition required by the contract below mentioned.

(2) The petition alleged a contract, called the "Compromise Contract", signed by Porrata and the four Mer-

cado heirs, two of them respondents herein, providing that all join in the execution of a partition deed to be prepared by Porrata pursuant to the contract and for a fee prescribed thereby. The contract was the basis of the entire petition, and those parts affecting Porrata directly or indirectly were quoted at length, together with allegations that Porrata had failed to perform his duties thereunder, but Porrata was not notified.

(3) When Porrata thereupon asked to be heard and to be given opportunity to prove that he had complied with the contract, his petition to be heard was met by an objection of the respondents based on unsound technicalities, while at the same time they, the respondents, were asking the Ponce District Court to pass upon Porrata's rights and duties.

(4) When the Ponce District Court refused to do so, and decided that Porrata had to be heard, respondents applied for a writ of certiorari before the Puerto Rico Supreme Court, again alleging in their petition Porrata's rights and duties under the contract, and served Porrata with copy of the petition and of the writ issued thereon. Porrata immediately challenged the jurisdiction of the insular supreme court to pass upon his rights and duties without notice and hearing before the court of original jurisdiction; but his contention was denied, the insular supreme court giving no reasons for that denial.

(5) Porrata appealed. The Circuit Court of Appeals affirmed the judgment of the insular supreme court, although obviously disapproving the findings and conclusions of that court, set forth in its opinion and embodied in its judgment by reference, in regard to Porrata. Now we are here before this court, asking review and not only a disapproval, but also for a complete reversal, giving validity to the principle that in no way can the rights and obligations of a person be adjudicated under our law without notice and hearing.

CONCLUSION.

WHEREFORE, Petitioner Porrata prays this Court to grant the writ of certiorari applied for in this case.

Respectfully submitted,

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